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Watching *Tokyo Trial*

Immi Tallgren*

Tokyo Trial is a historical TV series on the International Military Tribunal for the Far East in Tokyo. Its heroes are the audacious dissenting judges Pal and Röling—a rare choice that seems to point to a critical counter-narrative of international criminal justice. This article suggests multiple readings of *Tokyo Trial* that open up historiographical and ideological struggles beneath the tropes of an entertaining ‘docu-drama’.

Non, tu n’as rien vu à ... Tokyo

What did the birth of international criminal justice look like? On screen, it typically takes the shape of the International Military Tribunal sitting at Nuremberg from 1945 to 1946. In the miraculously orderly courthouse, erected on the ashes of an empire gone wrong, the mythical ‘Nuremberg legacy’ for the future is established. The good and evil sides of the story are immediately recognisable, eyes wide shut. The Nuremberg trial is emblematic of the mounting drive, as World War II ended, to establish ‘a peace which will afford to all nations the means of dwelling in safety within their own boundaries, and which will afford assurance that all the men in all the lands may live out their lives in freedom from fear and want’.¹ For the Allies, that peace would need to re-establish the distinction between just and unjust violence, and it would do so through criminal trials.

Tokyo Trial is a miniseries of four episodes directed by Pieter Verhoeff and Rob King that brings into view a different historical setting for this familiar theme.² As the chief prosecutor, Joseph Keenan, stated in his opening statement

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1 Declaration of Principles Issued by the President of the United States and the Prime Minister of the United Kingdom, 14 August 1941, para. 6 (‘Atlantic Charter’).

2 *Tokyo Trial*, dir. P Verhoeff & R King (2016).

at the International Military Tribunal for the Far East (IMTFE) in Tokyo: ‘we are waging *a part of the determined battle of civilization* to preserve the entire world from destruction’.³ Although not unknown to international lawyers or historians, the events featured are far less frequently represented on screen than is Nuremberg. *Tokyo Trial* narrates a period that starts with the arrival of the first Allied judges of the IMTFE in Tokyo in early 1946 and terminates with their departure in November 1948. The IMTFE tried 28 former Japanese generals, admirals and politicians for acts committed between January 1928 and September 1945. The Tribunal was set up pursuant to the Potsdam Proclamation of 26 July 1945, which declared ‘[w]e do not intend that the Japanese shall be enslaved as a race or destroyed as a nation, but stern justice shall be meted out to all war criminals’.⁴ Demanding ‘the unconditional surrender of all Japanese armed forces’, it threatened: ‘[t]he alternative for Japan is prompt and utter destruction.’⁵ The atomic bombing of Hiroshima followed 11 days later on 6 August 1945, then Nagasaki. Peace was installed; justice was to follow.

In January 1946, the Charter of the IMTFE was adopted by General Douglas MacArthur, head of the Allied occupation in Japan.⁶ It followed the example of the Charter of the International Military Tribunal (IMT) of Nuremberg, which formed part of the London Agreement of 1945.⁷ The IMTFE had jurisdiction over ‘crimes against peace’, ‘conventional war crimes’, and ‘crimes against humanity’.⁸ The accused—with the exception of three who died during the trial or were declared unfit to stand trial—were all found guilty and sentenced to imprisonment or death. Seven convicts, including former Prime Minister of Japan, Hideki Tojo, were hanged.

Tokyo Trial was produced by Japan’s public broadcaster NHK in co-operation with US media giant Netflix. It is thus a mainstream drama, not targeted at film festivals or the rare aficionados of war crimes trials of the past. Its four

3 RJ Pritchard & SM Zaide (eds), *The Tokyo War Crimes Trial: The Complete Transcripts of the Proceedings of the International Military Tribunal for the Far East in Twenty-Two Volumes*, vol. 1 (Garland Publishing, 1989) 384 (emphasis added).

4 Proclamation Defining Terms of Japanese Surrender, US–China–UK, signed 26 July 1945, 3 Bevans 1204, para. 10 (‘Potsdam Proclamation’).

5 Ibid para. 13. See also Special Proclamation: Establishment of an International Military Tribunal for the Far East, signed 19 January 1946.

6 Charter of the International Military Tribunal for the Far East, signed 19 January 1946, amended 26 April 1946, TIAS 1589, 4 Bevans 20, 27 (‘Tokyo Charter’).

7 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, signed 8 August 1945 (‘London Agreement’).

8 Tokyo Charter Art. 5.

episodes—each 45 min in length—start with a statement: ‘The following is based on true events.’ Such a claim to ‘truth’ is one of the distinctive qualities of the genres of the ‘biopic’⁹ and ‘docudrama’.¹⁰ (I will return to this point below.) *Tokyo Trial* makes use of visual techniques and choices of setting familiar from countless historical dramas put on screen. Actors carry the names and mimic the appearance of historical characters. Film footage from archives is combined with new images in black and white, with intercuts so tight that, at times, the film almost succeeds in immersing its actors in the images of events back in time. This skilful use of digital technologies, which creates the delusive impression of ‘being there’, underlines at the same time the artefactual nature of the series, as a construction rather than a representation, an audio-visual commodity for consumption in the 2010s. Yet, in contrast with the near seamless collage of its high-tech production, the plot of *Tokyo Trial* is linear, other than a few exceptional moments, and the *mise-en-scène* is conventional and visually unsurprising. These choices are presumably aiming at ‘realism, with illusionist simulation of real-world experiences and emotions’, still the ‘privileged mode of discourse’ of cinema and television productions of the past as Steve Anderson has argued.¹¹

Since the end of the Second World War (WWII), there has been a wealth of fictional films, TV-series, and documentaries on the (‘international’) criminal responsibility for Nazi crimes. On screen, the IMT itself often appears melded with some of the 10 American trials based on Control Council Law No 10¹² that took place in the same courtroom, since documentary film footage and details have been used without much historical precision. The first representation was Orson Welles’s *The Stranger* (1946), the most famous is undoubtedly Stanley Kramer’s *Judgment at Nuremberg* (1961) on the trial of the Nazi lawyers, and the most recent include the TV series *Nuremberg* (2000). In 1961, the Eichmann trial in Israel, again dealing with Nazi crimes, attracted unprecedented media interest. Several recent films have been produced on that trial, using the film archives of the trial in various formats.¹³

9 See, e.g., GF Custen, *Bio/Pics: How Hollywood Constructed Public History* (Rutgers UP, 1992).

10 See, e.g., A Rosenthal (ed.), *Why Docudrama? Fact-Fiction on Film and TV* (Southern Illinois UP, 1999).

11 SF Anderson, *Technologies of History: Visual Media and the Eccentricity of the Past* (Dartmouth College Press, 2011) 5.

12 ‘Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity’, Control Council Law No 10, 20 December 1945, 3 *Official Gazette of the Control Council for Germany* (1946) 50.

13 See, e.g., *The Specialist*, dir. E Sivan & R Braumann (1999); *Henchman Glance*, dir. C Marker (2010); *Hannah Arendt*, dir. M von Trotta (2012); *The Eichmann Show*, dir. PA Williams (2015).

In comparison, the IMTFE has attracted relatively little attention from filmmakers. In Japan, *The Great East Asia War and the International Tribunal* (1958) and Shunya Ito's *Pride* (1998) both provide a sympathetic vision of the accused. A Japanese documentary, *The Tokyo Trial* (1983) by Masaki Kabayashi, became very popular in its home country.¹⁴ A recent Chinese film, *The Tokyo Trial* by Qunshu Gao (2006), presents the trial from the point of view of the Chinese judge Mei Ju-ao. Even less often seen on screen are the great number of criminal trials of Japanese held in a variety of countries based on national legislation, including in the US, the UK, China, Singapore, Australia, the Philippines and the Netherlands. To mention a rare example, Takashi Koizumi's *Best Wishes for Tomorrow* (2007) features the trial of Lieutenant General Tasuku Okada in Yokohama. Australian trials on the treatment of POWs in Indonesia are depicted in *Blood Oath* (Stephen Wallace, 1990). More broadly, WWII as experienced in Asia and the Pacific, has, of course, been the subject of numerous films, series, and documentaries.¹⁵ Many films also address acts we would today label as 'international crimes', and the moral, political or legal responsibility for them. However, the European theatre of war, and Nazi criminality during and preceding it, have attracted much more interest from producers and directors, as well as from scholars and the public.¹⁶

Similarly, the IMTFE and the other Pacific trials are typically not taken into account in the growing recent scholarship on international (criminal) law and film, an interdisciplinary field with interesting contributions by scholars of law, history, film, and media studies.¹⁷ Topics much discussed with regard to

14 See, e.g., M Futamura, *War Crimes Tribunals and Transitional Justice* (Routledge, 2008) 80-82; D Middleton, 'Film: The Tokyo Trial', *New York Times*, 25 September 1985.

15 These include: *The Bridge on the River Kwai*, dir. D Lean (1957); *Hiroshima mon amour*, dir. A Resnais (1959); *Hell in the Pacific*, dir. J Boorman (1968); *Children of Nagasaki*, dir. K Kinoshita (1983); *Merry Xmas Mr Lawrence*, dir. N Oshima (1983); *Black Rain*, dir. S Imamura (1989); *The Thin Red Line*, dir. T Malick (1998); *Horror in the East: Japan and the Atrocities of World War II*, dir. L Rees & M Balazova (2000); *Pearl Harbour*, dir. M Bay (2001); *Don't Cry, Nanking*, dir. W Ziniu (1995); *Nanking*, dir. B Guttentag & D Sturman (2007); *The Rape of Nanking*, dir. S Viallet (2007); *City of Life and Death*, dir. L Chuan (2009); *Letters from Iwo-Jima*, dir. C Eastwood (2006); *The Pacific*, dir. J Podeswa et al. (2010).

16 It suffices to think of *Nuit et brouillard*, dir. A Resnais (1956); *Sophie's Choice*, dir. A Pakula (1982); *Shoah*, dir. C Lanzmann (1985); *Music Box*, dir. C Costa-Gavras (1989); *Schindler's List*, dir. S Spielberg (1993); *La vita e bella*, dir. R Benigni (1998); *The Pianist*, dir. R Polanski (2002); *Son of Saul*, dir. L Nemes (2016).

17 They are not discussed in key works such as C Delage, *Caught on Camera* (University of Pennsylvania Press, 2014); C Vismann, *Medien der Rechtsprechung* (Fischer, 2011); L Douglas, *The Memory of Judgement* (Yale UP, 2001); U Weckel, *Beschämende Bilder* (Frank Steiner Verlag, 2012); P Rush & O Simić (eds), *The Arts of Transitional Justice* (Springer, 2014); LJ Moran et al. (eds), *Law's Moving Image* (GlassHouse Press, 2005); C Delage & P Goodrich (eds), *The Scene of Mass Crime* (Routledge, 2013), or amongst the presentations at the LSE seminar 'International Criminal Justice and/on Film', 12-13 September 2016. A Lagerwall, 'Quand la justice pénale

the Nuremberg trials—such as the elaborate prosecutorial strategies and adjustments to courtroom design developed to introduce filmed recordings of atrocities into the trials themselves, as evidence, but also as a means of shaming the accused by confronting them with their deeds¹⁸—seem to have attracted little scholarly attention in the case of the IMTFE.

Tokyo Trial is thus a rare event and very welcome. In this review essay, I analyse *Tokyo Trial* with particular attention to two attributes. The first is the rare choice of judges as the main protagonists. In contrast to typical ‘courtroom dramas’, where judges figure as public actors in a wider narrative of a criminal trial where the focus typically is on its other actors, the emphasis in *Tokyo Trial* is on the judges’ own confidential deliberations, their informal encounters, and their conflicts. The struggle to arrive at judgments in order to terminate the lengthy trial forms the only truly dramatic twist within the series. The function of an international criminal judge is, on the one hand, represented as the height of independent individual agency, moral discernment, and historical importance. As Justice Henri Bernard from France articulates it: ‘we are here to decide what is best for humanity’ (episode 2). On the other hand, the manoeuvring and politicking by the majority judges make them appear calculating if not outright conspiratorial. This contrast between an idealised and a critical ‘realpolitik’ view of international judges raises questions. Idolised as sculptors of the future of humanity, judges are also denuded humans: vain, calculating, hesitant, struggling, bored, and ailing individuals. Vested with the power to adjudicate a war that touched the lives of hundreds of millions, ‘writing a much needed history of events which otherwise would not have been written’,¹⁹ how do judges really do it? What is there to see?

The second matter I address is how and why *Tokyo Trial* goes against recent cinematographic and scholarly attention, much of which is guided by its advocacy for a ‘fight against impunity’, the unquestioned value of organising (international) criminal trials. In *Tokyo Trial*, the heroes are, by contrast, the dissenting judges—the ones who question and doubt. Against all odds, they try to make sense of the broader context of the law they are nominated to apply, the jurisdiction they are called upon to exercise. I analyse how the series emphasises the complexity and challenges of international criminal justice. It brings a

internationale tient le premier rôle’, in O Corten & F Dubuisson (eds), *Du droit international au cinéma* (Pedone, 2015) 241, 259–60 discusses, in passing, *The Emperor*, dir. P Webber (2012).

18 As Ulrike Weckel suggests: Weckel (2012). On the IMT courtroom and screen, see Delage (2014); Visman (2011).

19 AF Mignone, ‘After Nuremberg, Tokyo’ 25 *Texas Law Review* (1947) 475, 490.

politics into view, echoing not only the oft-heard critique that international criminal trials merely instantiate a ‘victor’s justice’ but also providing a thoroughly critical perspective on international law’s colonial underpinnings. This theme was, of course, of burning topicality at the time of the Nuremberg and Tokyo trials. But too often it gets hidden in progressive historical narratives of international criminal justice today. In this sense, *Tokyo Trial* can be read as an anti-celebration of the birth of international criminal justice, a critical ‘counter-narrative’ which brings into the picture doubt and anxiety about the possibility of an alternative, a road not taken: what if Justice Radhabinod Pal or Justice Bert Röling were right? Yet, isn’t *Tokyo Trial*, as I argue, far too ambivalent to be read merely as a critique of international criminal justice, its past and future? *Tokyo Trial*—broadcast in Japan on 12–15 December 2016, exactly a week after the 75th anniversary of the attack on Pearl Harbour—is also an intervention into the sediment of historiographical and ideological struggles, in fractured social and political temporalities that are ‘post-colonial’ in different senses of the word, both local and global. Underneath its somewhat clumsy historical TV-drama tropes, *Tokyo Trial* relays complex messages that deserve not to get lost in translation.

SPOTLIGHT ON JUDGES

Many films about international criminal trials focus on prosecution and investigation. There is typically some sort of suspense relating to the investigation and capture of suspects, or the dilemmas of deciding on the charges. In contrast, the prosecution, headed by the American Joseph Keenan, is not very visible in *Tokyo Trial*. The defence counsel—the prosecution’s counterpart in the primarily US-inspired adversarial criminal procedure—are also represented at a distance. Both sides appear only in archival footage of the IMTFE courtroom. The accused are likewise represented only through archival footage and photographs. They remain mainly a collective, with the exception of Foreign Minister Togo and Prime Minister Tojo. The victims of the crimes, too, are largely absent (apart from a couple of intercut scenes of victim-witness testimony).

The stars of *Tokyo Trial* are the judges, and the suspense develops around the preparation of the judgment. For much of the time, the camera observes the judges’ *in camera* deliberations, or features them on the bench in the courtroom of the former Japanese military academy at Ichigaya in central Tokyo.²⁰ For

20 See, e.g., Y Totani, *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II* (Harvard UP, 2008) 8–10; AC Brackman, *The Other Nuremberg: The Untold Story of the Tokyo War Crimes Trials* (Fontana/Collins, 1990).

more intimate encounters the favoured set is the imposing Imperial Hotel, designed by Frank Lloyd Wright, where the judges were staying. The hotel restaurant and bar are the settings for scenes of innumerable meals and drinks (even if most of the series was filmed in less pricey Lithuania). Several
 5 key scenes also take place in the privacy of hotel rooms where the judges work, write letters, and relax, and where they occasionally pay each other surprise visits. With the solitary scenes of a judge, *Tokyo Trial* faces the challenge of rendering visually and narratively captivating, a static and introverted activity: intellectual legal work. Just how much drama can one make out of a man sitting
 10 with a typewriter at a desk, blowing out smoke—even if accompanied by a tumultuous sound-track? In *Hannah Arendt*, director Margarethe von Trotta used many similar static images of a smoking woman in deep contemplation to depict the tormented creation of *Eichmann in Jerusalem* and (miraculously perhaps) the tension of those moments—when the drama takes place only in
 15 an intellectual's mind—did successfully come through. Regrettably, however, this miracle rarely occurs in *Tokyo Trial*.

Potentially more promising are the other recurrent scenes where judges nervously face each other across the prestigious room in which their deliberations take place. The constant smoking (again), zoom-ins on serious faces torn
 20 by internal struggles, and shot/reverse shots of verbal encounters stand in for the intensity of legal arguments. Other visual elements are scarce, mainly comprising changes of attire and the movement of characters around the table, helping themselves to tea or nervously traipsing around the room. It is impossible not to be reminded of *Twelve Angry Men* (Sidney Lumet, 1957). In that
 25 classic film, the claustrophobic tension and suspense of a jury's decision-making in a murder trial in New York are created with a single set. Behind the locked door, in a room with a large wooden table (and the neighbouring restroom), the jury members nervously alternate between sitting and standing postures, pacing round the table, smoking, wiping away sweat, and fumbling
 30 with their notebooks, pens or wallets. The spectator is drawn into the escalating struggle among the jury members through a rhythmic interchange of close-ups. The pressure and the heat of New York communicate the weightiness of deciding a man's life. In *Tokyo Trial*, the pace is less intense. The spectator is constantly permitted to escape the room, travelling from a hotel suite to the
 35 courtroom and the hotel restaurant before re-entering the deliberations. In the courtroom scenes, archival material is skilfully intercut with black and white remakes. The spectator gets a sense of the routine of the Tribunal, the vast room, the distance of the actors from each other, and the dragging verbal communication via interpretation. The IMTFE trial lasted for 417 courtroom
 40 days, and the transcript of the proceedings totalled 48 412 pages. The mist of the accumulating fatigue and frustration reach the spectator of *Tokyo Trial* as the

episodes go by. One might wonder what Rebecca West—given her quip about ‘the citadel of boredom’ at the (much shorter) Nuremberg IMT trial²¹—would have made of the IMTFE.

Among the 11 judges, the focus is on two, in particular. They are the prominent dissidents of the bench: Justice Pal from India (played by the Bollywood star Irrfan Khan of *Slumdog Millionaire* fame (Danny Boyle, 2008)) and Justice Röling from the Netherlands (played by Marcel Hensema). Both Pal and Röling provided influential, at least in hindsight, dissenting opinions.²² The road to these opinions forms the core intrigue of *Tokyo Trial*. Why should Röling feel the need to re-open what had just been decided by another Allied court at Nuremberg on crimes against peace? And how to explain the Indian judge boldly acquitting all the accused, even though he claimed not to condone the atrocities? The series narrates these legal issues mainly in terms of Pal’s and Röling’s confrontation with the judges nominated by the UK, the US, Canada, and New Zealand. Those four Justices—Lord William Patrick (Paul Freeman), General Myron C Cramer (Tim Ahern), Edward Stuart McDougall (Stephen McHattie) and Erima Harvey Northcroft (Julian Wadham)—are united in their defence of what might be termed the ‘Western’ point of view, made flesh in the Nuremberg legacy, and in their support for the US goal of seeking closure for the Pearl Harbour attack.

Another pole of tension is represented through the President of the Tribunal, the Australian Sir William Webb, Chief Justice of the State of Queensland (Jonathan Hyde). Dismay at President Webb’s comportment, and the conflicts that arise between him and several of the other judges, is a major point of intrigue. Yet, its causes and twists may remain mysterious to anyone without prior knowledge of the events. Justice Webb, described as ‘coarse, ill-tempered and highly opinionated’²³ in Tokyo, does come across as incompetent, and often frustrated by his struggles between General MacArthur, the other judges (not convinced by his presidency), and his own government (itself under pressure from the other Allies). But that does not quite suffice to generate dramatic tension. What does President Webb really want? Where does he stand? The spectator of *Tokyo Trial* receives no answer.

21 R West, *A Train of Powder* (Viking Press, 1955) 3.

22 The judgment was far from unanimous: it consisted of three dissenting opinions (in addition to Justices Pal and Röling, Justice Bernard dissented), a separate opinion (Justice Webb) and a concurring opinion (Justice Jaranilla).

23 J Pritchard, ‘An Overview of the Historical Importance of the Tokyo War Trial’, Nissan Institute of Japanese Studies, Occasional Paper Series No 5 (1987) 17.

The Chinese judge Mei Ju-ao (David Tse) and the Soviet judge, General Ivan Zaryanov (Kestutis Stasys Jakstas) are represented in a rather sympathetic light as individual judges with their own peculiarities, also stemming from the political contexts of their nations. Mei insists on a seating arrangement that gives him a prominent place among the victorious developed nations sitting in judgement over their cruel Japanese aggressors. He must render a judgment that honours China: 'I want to be sure that what I decide for Asia is good . . . and also seen as fair by the rest of the world. So I am joining the majority' (Mei, episode 4). Zaryanov is featured as a caricatured Soviet General proposing vodka toasts and making clumsy jokes, surprising only in 'upholding Stalin's policy to abandon the death penalty' (episode 4)—an apparent reversal of the Soviet stance at Nuremberg, where they strongly supported capital punishment. The first US judge, John P Higgins, soon leaves for home, frustrated, and is replaced by General Myron C Cramer. Interestingly, the Soviets and the Americans both send hard-boiled military judges. They are united in their view that the end-goal counts more than legal argument. The French judge Henri Bernard (Serge Hazanavicius) comes across as a passionate and tormented side-figure tarnished by his adherence to the ideology of the Western civilizing mission: 'I still believe colonialism can be good, in places where people lack a civilized government and a decent way of life' (episode 3). The Philippine judge Colonel Delfin Jaranilla (Bert Matias) is represented as an exotic elderly character marked by his suffering at the hands of the Japanese (the Bataan 'death march' of 1942, and the destruction of Manila), and struggling with a personal quest for vengeance.

Little is seen of Tokyo or Japan in *Tokyo Trial*, apart from a couple of excursions to sites of worship or to the seaside, the latter by a Justice Röling homesick for the Dutch shores. Unlike other films of the genre, for example on the Nuremberg trials, which typically use concentration camp footage, *Tokyo Trial* makes scarce and sober use of images of violence and suffering. The scene is set with archival images: the nuclear mushroom cloud in the sky, an aerial attack (on what looks like Pearl Harbour), and a passing close-up of civilians' bodies on a street (presumably footage from Nanking). In the new takes for *Tokyo Trial*, occupiers' cars crawl through burned rubble and shacks representing post-war Tokyo. Very little is shown of the victims of Japanese war crimes: no POW camps or marches, no Kamikazes sinking ships at sea. Apart from a minute at the beginning of the first episode, there is no visual allusion to the enormity of the massacres in China or in The Philippines. There are no hints of the widespread sexual violence at all. And one sees few images of the imperial Japanese army. *Tokyo Trial* is very prudish about the debris of war. Is this merely a discreet choice of style and tone so the audience is not forced to

consume the ‘pornography of pain’?²⁴ Or does the prudishness of the directors and producers stand for something else? I will return to these questions.

Nor is the viewer’s attention directed to romance or sex. What comes closest is a side-story of Rölöng’s passion for classical music, and his encounters with an attractive blonde virtuoso pianist, something of a clichéd character, combining blunt, authoritative behaviour and German origin. If Justice Rölöng’s youngest son Hugo’s recent biographical book is to be taken as an authority here, the series is not ‘based on true events’ in this regard.²⁵ Be that as it may, the scenes of the empathetic but cautious Rölöng conversing with the dramatic German blonde seem to recall the legendary scenes of *Judgment at Nuremberg* between the US President of the Tribunal (Spencer Tracy) and an enticing German general’s widow (Marlene Dietrich).²⁶ Romance lovers might regret that Rölöng’s encounters with the pianist fall short of the electricity of the original cinematographic reference. In fact, it is not heterosexual romance alone, but women in general, that remain at the margins of the series. They figure in the roles of servants, bikini contest participants, and family members of the accused at the Tribunal. Apart from the Soviet judge’s somewhat bleak but astute interpreter, and a few young women glimpsed typing up the judgment, no professional women appear in *Tokyo Trial*. International criminal justice in Tokyo is shown as exclusively a man’s world. This is not far from the ‘true events’.²⁷

DISSENTERS AS HEROES

Above all else, our profession is meant to interpret laws, which, by their very nature, can be understood in different ways. And nothing is more important than the reasons for that interpretation. (Rölöng, episode 4)

The IMTFE was an ad hoc criminal tribunal created after the alleged crimes it was established to judge, and based on arguably retroactive criminal law, apart from ‘conventional war crimes’. Its only precedent was the Nuremberg IMT, which was still in session as the IMTFE judges gathered in Tokyo. At the time, the word ‘international’ in the Tribunal’s title did not carry

24 K Halttunen, ‘Humanitarianism and the Pornography of Pain in Anglo-American Culture’ 100 *American Historical Review* (1995) 303.

25 H Rölöng, *De rechter die geen ontzag had: Bert Rölöng en het Tokiotribunaal* (Wereldbibliotheek, 2014) 198–201.

26 Ibid.

27 For an exception, see, e.g., S Tabak, ‘Grace Kanode Llewellyn: Local Portia at the Tokyo War Crimes Tribunal’ *International and Comparative Law Perspectives* (Fall, 2013) 7.

the universalist or consensualist connotations that the International Criminal Court (ICC), with over 120 ratifications, arguably has today.²⁸ The IMTFE was established by the Allies, the victors in the war, and—in their perception at least—also the main victims of the war. The judges were nominated by their home states and so were on the bench without having been elected. Those states were committed to the Allies’ agreements and declarations on ending the war, the tone of which left little doubt as to the mission of the judges: ‘There must be eliminated for all time the authority and influence of those who have deceived and misled the people of Japan into embarking on world conquest’.²⁹

That Röling—a criminal law expert from the civil law tradition—should feel troubled by such a setting is hardly surprising. Where is the loyalty of an ‘international’ judge to lie? This is the question *Tokyo Trial* asks. Should it be to the home state that nominated him, and its political decision-makers and the expectations of its ‘public opinion’? Or to his personal understanding and interpretation of the ‘law in force’ according to his own private convictions? In *Tokyo Trial*, most of the judges are shown not to face a conflict. Either their convictions correspond to the mission they have, or they manage to suppress any internal conflict. There is widely shared dismay at General MacArthur’s decision not to involve Emperor Hirohito in the trial—the topic of another recent mainstream film.³⁰ President Webb’s disagreement on this point culminates in his separate opinion. But most of the judges are shown to suppress their doubts. The plot focuses on the judges—Pal and Röling—who expose their torment as they enter into conflicts, whether vis-à-vis their home state, the colonial rulers of their home country, or the Allies as the self-nominated masters of a ‘new order’ in the guise of international law.³¹

The attention to Röling and Pal may at the simplest be traced back to the producers, directors and, in particular, the four authors of the screenplay: Rob King, Max Mannix, Toru Takagi, and Kees van Beijnum (the latter the author of the novel *De offers*, itself purportedly influenced by Hugo Röling’s writing).³²

The financial and intellectual forces behind the series thus include a strong Japanese and Dutch component. Beyond that, the antagonistic relations of a hero (or two heroes) with members of a given community is a typical pose in

28 Rome Statute of the International Criminal Court, signed 17 July 1998, entered into force 1 July 2002, 2187 UNTS 90.

29 Potsdam Proclamation para. 6.

30 *The Emperor*, dir. P Webber (2012).

31 Potsdam Proclamation para. 6.

32 K van Beijnum, *De offers* (De Bezige Bij, 2014).

the genre of the biopic.³³ As Bertolt Brecht noted, '[t]he element of conflict in these bourgeois biographies derives from the opposition between the hero and the dominant opinion, which is to say the opinion of those who dominate.'³⁴

5 The plot, casting Röling and Pal as the heroes of the story, is again reminiscent of *Twelve Angry Men*. In that film, set in a court in New York, the jury has heard the trial of a youngster from a Hispanic immigrant family with a history of violent crime. He is accused of murdering his father with a knife. Both witness testimony and material evidence seem to confirm his guilt. When the members of the jury retire to consider their verdict, they expect to reach a
10 conclusion quickly. The situation changes when one man (Henry Fonda) succeeds in planting the seed of 'a reasonable doubt'. A confrontation unfolds, with ardent passions aroused both in argument and voting. In *Tokyo Trial*, it is the latecomer Pal who first induces doubt, but the more sympathetic and moral 'Henry Fonda' character is Röling. The series depicts Röling initially as a consensus figure, keeping disagreements among the judges confidential. Referring
15 to his national legal tradition, he argues (supported by Justice Bernard) against dissenting opinions. Before latecomers Pal and Jaranilla³⁵ join the group, the judges affirm:

20 that, as Members of the International Military Tribunal for the Far East, we will duly administer justice, according to law, without fear, favour or affection, and according to our consciences, and the best of our understanding and that we will not disclose or discover the vote or opinion of any particular member of the Tribunal upon the finding or sentence but will preserve inviolate the secrecy of counsel of every
25 member.³⁶

Pal refuses to accept this position, reached in his absence. He also rejects head-on the move to uphold the Nuremberg findings on the criminality of aggressive war. After Pal has exploded the (relative) harmony of the group, Röling enters a state of turbulence both internal and external. He is torn: he

33 Custen (1992) 89.

34 T Elsaesser, 'Film History as Social History: The Dieterle/Warner Brothers Bio-Pic' 8 *Wide Angle* (1986) 15, 24.

35 The US State Department recommended that they be included, 'since the Tribunal will be trying Japanese war criminals it is believed that it would strengthen the Tribunal, in the eyes of the peoples of south Asia, if at least one additional Asiatic nation is represented'. US Department of State, 'Memorandum by the Director of the Office of Near Eastern and African Affairs (Henderson) to the Secretary of State' (1 March 1946), in JG Reid & HA Fine (eds), *Foreign Relations of the United States, 1946*, vol. 8 (US Government Printing Office, 1971) 418, 419.

36 N Boister & R Cryer (eds), *Documents on the Tokyo International Military Tribunal: Charter, Indictment and Judgments* (Oxford UP, 2008) 701 [46] (Dissenting Opinion of Justice Röling).

believes in the purity of the interpretation of law by a ‘jurist’ (as he calls himself). At the same time, he feels for those who directly suffered from the war—on both sides—which does not make his task any easier. He must also cope with a different kind of external pressure than must Pal. His Western origins create the expectation that he should side with the other fellow (white) judges of the Allies. His government, represented by the head of the liaison office of the Netherlands in Japan, is not keen to respect his independence: Röling is made aware of the consequences of his ‘irresponsible’ action. Firmly and proudly, Röling refuses to bend: ‘I see my role as representing more than my own country’ (episode 3). Röling is also the youngest judge. In *Tokyo Trial*, this is dramatically contrasted with his strong character and his personal quest for justice. Hugo Röling’s account of his father—a source for the screenplay—paints his father’s rectitude in no uncertain terms, by reference to Martin Luther’s (legendary) words: ‘Here I stand. I cannot do otherwise.’³⁷

The legal positions that Bert Röling held at the IMTFE have been subject to much commentary, (including in his own later work),³⁸ most recently by Robert Cryer.³⁹ *Tokyo Trial* reproduces in a succinct manner the key aspects of Röling’s views on crimes against peace. His lack of conviction that crimes against peace existed prior to and during WWII makes it impossible for him to join the seven judges who, in secret, prepare their majority judgment. But it does not lead him to join Pal’s decision to acquit all the accused of this charge. ‘There is no progress in international law if we let them all go free just because waging aggressive war was clearly not a crime when Japan went into war’, Röling tells Pal (episode 3). Röling seeks to escape the dilemma by means of his own dissent, taking a roundabout route to arrive at a partial agreement with the majority on those charges. Even if he holds that crimes against peace were not criminal per se, his view is that:

There is no doubt that powers victorious in a ‘bellum justum,’ and as such responsible for peace and order thereafter, have, according to

37 Röling (2014) 358.

38 See BVA Röling, *The Tokyo Trial and Beyond: Reflections of a Peacemonger*, ed. A Cassese (Polity Press, 1993).

39 R Cryer, ‘Justice Röling (The Netherlands)’, in Y Tanaka, T McCormack & G Simpson (eds), *Beyond Victor’s Justice? The Tokyo War Crimes Trial Revisited* (Martinus Nijhoff, 2011) 109. See also L Schouten, ‘From Tokyo to the United Nations: B.V.A. Röling, International Criminal Jurisdiction and the Debate on Establishing an International Criminal Court, 1949–1957’, in M Bergsmo, WL Cheah & P Yi (eds), *Historical Origins of International Criminal Law*, vol. 2 (Torkel Opsahl Academic EPublisher, 2014) 177; J Klabbers, ‘Principled Pragmatist: Bert Röling and the Emergence of International Criminal Law’, in F Mégret & I Tallgren (eds), *The Dawn of a Discipline: International Criminal Justice and Its Early Exponents* (forthcoming, manuscript on file with the author).

international law, the right to counteract elements constituting a threat to that newly established order, and are entitled, as a means of preventing the recurrence of gravely offensive conduct, to seek and retain the custody of the pertinent persons. Napoleon's elimination offers a precedent.⁴⁰

In *Tokyo Trial*, Röling is portrayed overall as a conscientious positivist-legalist, trying to navigate between what he personally regards as the best solution and what he believes the law says. Yet, this part of Röling's dissent did not accord well with the maxim *nullum crimen sine lege* that he wished to defend, if not consecrate—adopting a compromise inspired by the special treatment of 'political offenders' in national law. The rationale behind the *nullum crimen* maxim he wished to underline—i.e., legal certainty and predictability—are not served by deprivation of liberty for the sake of protection of a society or an 'order'. As Cryer points out, Röling's escape strategy has not stood the test of time particularly well: '[t]he modern resurgence of preventive detention in the "war on terror" shows how perceptions of danger can be overstated and can lead to disregard of human rights.'⁴¹ A legally-trained viewer of *Tokyo Trial* might notice some further discrepancies in Röling's legalism, such as his strong support for the death penalty with reference to an *ex post facto* Dutch special law re-establishing the death penalty for Nazi collaborators, characterised by him as 'brought about by unthinkable crimes' (episode 4).

The evolution and legal reasoning behind Justice Pal's full-frontal dissenting judgment may remain even more opaque for *Tokyo Trial's* audience. Pal is represented as acting boldly and freely, in a manner both personal and consistent. Yet despite stating that, 'I do not condone the atrocities' (episode 2), Pal appears insensitive to the suffering of victims. In his dissent, for example, he characterises the 'Bataan death march' as 'an isolated instance of cruelty'.⁴² Pal is also often absent from the hearings claiming (oddly, given that the trial was still ongoing) that 'I need time to work on my judgment' (episode 3). In *Tokyo Trial*, Pal, unlike Röling, comes to Tokyo with a clear agenda and steady nerves, and executes his plan without equivocation. He disagrees with the majority both on facts and the law. The Pact of Paris of 1928 (the Kellogg-Briand Pact)⁴³ 'does not provide legal ground for criminalising war' (episode 2).

40 Boister & Cryer (eds) (2008) 701 [46] (Dissenting Opinion of Justice Röling).

41 Cryer (2011) 116.

42 Boister & Cryer (eds) (2008) 665 (Dissenting Opinion of Justice Pal), quoted in ES Kopelman, 'Ideology and International Law: The Dissent of the Indian Justice at the Tokyo War Crimes Tribunal' 23 *New York University Journal of Law and International Politics* (1991) 373, 417 note 165.

43 General Treaty for Renunciation of War as an Instrument of National Policy, signed 27 August 1928, entered into force 25 July 1929, 94 LNTS 57 ('Kellogg-Briand Pact').

War is not criminal as such, and even less could the Japanese leaders be shown to have conspired to start it and become responsible for ‘acts of state’. With regard to the ‘atrocities’ charged as war crimes and crimes against humanity, Pal does not deny that some may have taken place. But he remains unconvinced that the defendants had ordered, authorised, or permitted them. Pal declares that he finds it sufficient that ‘the Japanese officers who committed these atrocities have been tried in local courts where they took place and have been given sentences’ (episode 2).

In the early 1990s, Elizabeth S Kopelman analysed Justice Pal’s stated rationale for his ‘dissentient’ judgment, providing alternative interpretations to explain his underlying ideology.⁴⁴ She proposed a spectrum of mutually non-exclusive readings of Pal as a positivist, as a ‘radical’, or as an academic. With regard to Pal’s underlying ideology, Kopelman sketched him alternatively as an anti-ideologue, as a pan-Asianist, or as articulating a ‘precursor to Third World perspectives on international law’.⁴⁵ In today’s commentaries, it is not unusual to situate Pal’s arguments as ‘a subaltern critique of Western international law’,⁴⁶ making Pal a forefather of the school of Third World Approaches to International Law (TWAIL). Pal stands for the rejection of international criminal law as, to quote Gerry Simpson, one of the tools ‘for stabilising and securing existing power distributions within international society’ and for ensuring that ‘the frontiers created by the original sin of colonial misdistribution’ remain fixed.⁴⁷ Pal’s dissent can be read as a plea for rejecting international criminal law—at least as far as crimes against peace are concerned—in order not to paralyse the status quo of international affairs, and thereby implicitly arrive at ‘the criminalisation of the struggle against colonialism’.⁴⁸ Latha Varadarajan argues that Pal exposed and rejected the ‘weaving of [a] cloak of universal morality and legal institutionalization over the older, existing structure of imperialism’.⁴⁹

The tone and emphasis are different in the fame that Justice Pal and his ‘dissentient’ judgment enjoy in Japan. As Nakijama Takeshi argues, ‘Pal’s judgment’ has been and continues to be instrumentalised for revisionist claims in post-war Japan.⁵⁰ Instead of unveiling and denouncing Japanese imperialism,

44 Kopelman (1991).

45 Ibid. 428.

46 S Moyn, ‘Judith Shklar versus the International Criminal Court’ 4 *Humanity* (2013) 485.

47 G Simpson, ‘Writing the Tokyo Trial’, in Tanaka, McCormack & Simpson (eds) (2011) 23, 27.

48 K Sellars, *Crimes against Peace and International Law* (Cambridge UP, 2013) 237.

49 L Varadarajan, ‘The Trials of Imperialism: Radhabinod Pal’s Dissent at the Tokyo Tribunal’ 21 *European Journal of International Relations* (2015) 793, 807.

50 N Takeski, ‘Justice Pal (India)’, in Tanaka, McCormack & Simpson (eds) (2011) 127.

Pal's dissent serves to defend the conquest of a Grand Asia.⁵¹ Part of the problem in the immediate post-war situation was the lack of knowledge of what Pal actually wrote, and in what context. Pal's dissent was not published with the Judgment in Tokyo and only appeared much later in a version published in India.⁵² Beyond these two readings of his opinion—orientated towards either TWAIL or revisionist, Nippon (pan-Asian) nationalism—other commentaries call for heterodox interpretations of Pal's dissent based on psychoanalysis, religious philosophy, mythology, and other traditions.⁵³ Milinda Banerjee's recent works participate in the same discussions, further situating Pal's ideas in the frame of theories of sovereignty and decolonisation.⁵⁴

In terms of the options in Kopelman's spectrum, *Tokyo Trial's* Justice Pal comes closest to a 'radical' using 'rule of law' positivism as his weapon: 'We cannot arbitrarily impose new international laws' (episode 3). With regard to the underlying ideology, *Tokyo Trial's* Pal leans on anti-colonialism and anti-imperialism, with hints of pan-Asiatic tendencies. In his discussions with Röling, Pal links the trial directly to the question of colonialism. When the British Justice, Lord Patrick bluntly dismisses Pal's views in a judges' meeting: 'If you cannot follow the Tokyo Charter, you should return to Calcutta', Pal is offended and snaps back: 'I did not come from a country that struggles to gain its independence in order to have my arguments discarded or to be told to go home' (episode 2).

My aim here is not to judge whether *Tokyo Trial* does justice to the historical characters and legal thinkers Pal and Röling. Should it be the case that their dissents have been 'instrumentalised' for one cause or another, as some might conclude, this would not be the first time. It is more interesting to reflect upon how the circumstances of their assignment as judges at the IMTFE rendered them easily malleable for such use, and whether that is an inherent characteristic of international criminal justice. *Tokyo Trial* succeeds in picturing how the freedom and power of an individual judge may at particular moments have seemed almost limitless or arbitrary. Judges are shown as free agents

51 See Totani (2008) 227-28.

52 Pal also published *Crimes in International Relations* (University of Calcutta Press, 1955), which addresses many of the themes of his dissent.

53 See, e.g., A Nandy, 'The Other Within: The Strange Case of Radhabinod Pal's Judgment on Culpability' 23 *New Literary History* (1992) 60; B Hill, 'Reason and Lovelessness: Tagore, War Crimes, and Justice Pal' 18 *Postcolonial Studies* (2015) 156.

54 M Banerjee, 'Decolonization and Subaltern Sovereignty: India and the Tokyo Trial', in K von Lingen (ed.), *War Crimes Trials in the Wake of Decolonization and Cold War in Asia, 1945-1956* (Springer, 2016) 69; M Banerjee, 'Does International Criminal Justice Require a Sovereign? Historicising Radhabinod Pal's Tokyo Judgement in Light of His "Indian" Legal Philosophy', in Bergsmo, Cheah and Yi (eds) (2014) 67.

struggling with their consciences within a legal situation close to *tabula rasa*, speaking singularly to the world, and thereby making history. There are some signs of such hubris in Pal's and Röling's dissents: no cause was too big for them to decide. As Judith Shklar put it, complimenting how, as compared to the Nuremberg IMT, 'the dissenters at Tokyo at least gave an ample airing to the whole issue . . . of the causes of war'.⁵⁵

Today the situation is strikingly different. With the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, the Extraordinary Chambers in the Courts of Cambodia, other ad hoc and hybrid tribunals, and the ICC, which has already had several rounds of elections of judges, the last 25 years must have seen more than 100 international criminal judges.⁵⁶ The judges and tribunals have with time become increasingly bound by a growing corpus of legal rules and case law. Their decisions can be scrutinised by regular channels of appeal, unlike at the IMT or the IMTFE. There is less scope for an individual judge to improvise and leave their fingerprints on a particular trial in a manner that becomes subject to widespread and lasting attention, as was the case for Pal's and Röling's dissents. Rather than lonely heroes or moral rebels, aren't international criminal judges today part of an established legal, political and bureaucratic machinery? Anyone narrating international criminal judges today might prefer to draw on collective processes in the manner of Pierre Bourdieu or Bruno Latour,⁵⁷ rather than zooming in on solitary powerful heroes as *Tokyo Trial* does. But of what—or whose—(hi)story are Pal and Röling the heroes?

OUR PAST, OUR STORY?

'The following is based on true events', it is claimed at the beginning of each episode of *Tokyo Trial*. Casually invoked in comparable productions, taken at face value such an assertion ought to trigger serious reflection. What is meant by 'true events' in *Tokyo Trial*? Certainly, a historical drama does not need to engage in scholarly discussions, historiography, media studies, or international law.⁵⁸ There is little sense in treating a docudrama 'as a book transferred to the

55 JN Shklar, *Legalism: Law, Morals, and Political Trials* (Harvard UP, 1964) 189-90.

56 See, e.g., D Terris, CPR Roman & L Swigart, *The International Judge: An Introduction to the Men and Women Who Decide the World's Cases* (Brandeis UP, 2007).

57 See P Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field' 38 *Hastings Law Journal* (1987) 814; B Latour, *The Making of Law: An Ethnography of the Conseil d'Etat*, trans. M Brilman & A Pottage (Polity, 2010).

58 For such discussions with regard to film and history, see, e.g., H White, 'Historiography and Historiophoty' 93 *American Historical Review* (1988) 1193.

screen, subject to the same sorts of judgements about data, verifiability, argument, evidence, and logic that we use for written history'.⁵⁹ This is not because one should condescendingly downplay film as a flawed medium, or historical drama as 'entertainment', but because such a point of view assumes that 'written history' itself would be truth cast in stone, as long as some particular disciplinary criteria were respected. *Tokyo Trial* is an audio-visual creation; it is not fruitful to place it in epistemological binary opposition to 'truth' as such. The interest of the truth claim of *Tokyo Trial* lies rather in its subject-matter: the series is trying to penetrate the inside of a criminal judgment which itself aims to establish a (judicial) 'truth'. *Tokyo Trial* serves its viewers a history of the production of judicial truth(s) in Tokyo.

In scholarship on international criminal law and 'transitional justice', the expectation of truth is today mostly discussed with regard to victims of crimes: to what extent do legal procedures allow them to discover 'the truth', or express 'their truths'. A new language of the 'right to truth' has recently emerged in human rights discourse.⁶⁰ And of course criminal law—and in particular criminal procedure—is supposed to assist in the discovery of 'true events' in order to determine criminal guilt: did the accused commit the crime and should she be punished for it? Displaying the professional and moral struggles of international judges on screen has little to do with the tragic ordeal of victims or the guilt of the accused. Yet it is not without importance. Like concentric circles rippling on water, the question of the 'true events' that underpin a major international criminal trial represented on screen broadens to the 'truth' of the specific acts of violence presented at the trial, and of the criminal responsibility established by the judgment. At the largest circle, a particular interpretation expands to a truth about the good or evil of international relations and international law *tout court*, based on the good or evil of the acts and politics of particular nations or peoples.

Watching *Tokyo Trial*, it becomes evident that its scriptwriters and directors were aware of the stakes. They have systematically chosen the tactic of a '*juste milieu*', walking a thin line through the nasty rubble of the past. Any images of Japanese crimes or verbal evocations of 'atrocities' are soon counter-balanced – a constant *tu-quoque* and '*nous aussi*', repeatedly dramatised through two main techniques. First, by featuring the Japanese suffering, chaos and poverty caused by the war and by the Allies: a glimpse of Japanese civilians' poverty and distress; dark silhouettes on chaotic roads; unkempt chil-

59 RA Rosenstone, 'The Historical Film: Looking at the Past in a Postliterate Age', in M Landy (ed.), *The Historical Film: History and Memory in Media* (Rutgers UP, 2001) 51.

60 See, e.g., P Naftali, *La construction du 'droit à la vérité' en droit international* (Bruylant, forthcoming).

dren patiently standing in line for their modest meal; the ruins of Tokyo. A typical example is Rölöng reading his first letter to his wife, Lies, upon his arrival in Tokyo (a narrative voice-off used recurrently in *Tokyo Trial*): ‘From here to Yokohama, there is nothing much left other than ashes and ruins. The hardships faced by the people here are almost unimaginable’ (episode 1). Second, by picturing Japan as the land of a long, refined culture and exquisite natural beauty: idyllic scenes of Buddhist temples and Shinto shrines; traditional gardens and tearooms; and Rölöng’s walks on the beach with a wise pacifist writer character in traditional clothing, representing Michio Takeyama, author of the post-war best-selling novel, *Harp of Burma*, which was later made into a film.

Looking more closely, carefully steering a middle course raises its own questions, despite the impression of neutrality. In the series, much of the interpretation of Japanese ‘atrocities’ and guilt seems to hang on a subliminal comparison with those of the Germans/Nazis, ‘the epitome of absolute evil in Western culture’.⁶¹ That issue was certainly in the minds of the judges in Tokyo. In *Tokyo Trial*, Justice Bernard, a former member of the French Resistance, argues, after hearing testimony on crimes committed during the ‘Nanking incident’, that ‘we should adjudicate them as conventional war crimes. There is no need to categorize them as crimes against humanity, like the Nazis with the exterminations of the Jews’ (episode 2). In legal terms, the issue reduces to the fact that Japanese ‘atrocities’ did not victimise their own nationals, and could thus be prosecuted as war crimes. Beyond that, however, *Tokyo Trial*’s Justice Bernard also seems to suggest that ‘Japan was not Germany; Tojo was not Hitler’.⁶² How to compare what cannot—as is often argued—be represented or even named?⁶³

Watching *Tokyo Trial*, I could not help wondering how the ‘balance’ of its historiographical construction would come across if applied to the Nuremberg IMT and, more broadly, to the criminal responsibility of the Nazis. A distribution of ‘equal’ blame between the Allies and the Nazis on screen would surprise many. Nevertheless, in today’s Japan, *Tokyo Trial* appears, if anything, highly critical of Japanese actions, when compared with many other representations and interpretations. At the Yūshūkan war museum next to the controversial Yasukuni shrine in Tokyo, for example, the heroic efforts by the Japanese military for their nation in all wars are equally celebrated. Their noble spirits are

61 GJ Simpson, ‘War Crimes: A Critical Introduction’, in TLH McCormack & GJ Simpson (eds), *The Law of War Crimes: National and International Approaches* (Kluwer, 1997) 1, 8–9.

62 Minear (1971) 134.

63 See, e.g., H White, ‘The Modernist Event’, in V Sobchack (ed.), *Persistence of History: Cinema, Television and the Modern Event* (Routledge, 1996) 17.

enshrined at Yasukuni, including those who succumbed to a 'judicial death' by 'enemy nations' or 'who killed themselves to take responsibility for' the war.⁶⁴ Like many other foreigners, I was intrigued, during my visits to Yūshūkan, by the crowds of Japanese gathered to venerate the photos, last letters, and personal objects of kamikaze pilots. A statue of Justice Pal erected next to the museum, one of several in Japan, bears the concluding words of Pal's dissent: 'When time shall have softened passion and prejudice, when Reason shall have stripped the mask from misrepresentation, then Justice, holding evenly her scales, will require much of past censure and praise to change places.'⁶⁵

At the time of Pal's dissent, similar language was used by others, such as Freda Uitley, in reference to the Nuremberg IMT: 'If ever the history of our times comes to be written by scholars free of national prejudices, the "crimes against humanity" committed by the victors of the second World War of the twentieth century AD, will appear as equal to those committed by the Nazis.'⁶⁶

Uitley was a marginal voice, who declared her intent to present a 'counter-narrative' (though without using that term) as 'a drop in the ocean compared to the continuous, and somewhat monotonous, spate of books, articles, newspaper reports, and radio comment which have by now established an accepted legend'.⁶⁷ Steering a middle way through 70 years of controversy, as *Tokyo Trial* struggles to do, is not a neutral act. It is definitively a choice. If both sides are equally guilty—or not guilty—the significance of the trial and the judgment is wiped away. Which party ended up on which side of the bench becomes merely an uncontrollable twist in the contingency of history, a *realpolitik* outcome of military and diplomatic battles. Does the series underline Pal's critique of international criminal justice as an exclusively political instrument in the hands of the powerful? In any case, in *Tokyo Trial*, a judicial truth has little value.

Much of the impression of 'true events' to be conveyed to the viewers of a historical drama comes down to a question about what is shown and what is omitted. In a criminal trial, the same logic of framing, delimiting and zooming

64 *Records in Pictures of Yasukuni Jinja Yūshūkan* (Yasukuni Shrine, 2009) 84. One of the many controversies relates to ethnic Korean and Taiwanese imperial service veterans who remain excluded from any benefits in post-war Japan, whereas the 'heroic spirits' of their befallen comrades are enshrined at Yasukuni against the will of their families: see J Orr, 'The Politics of Inclusion and Exclusion in Postcolonial Japan: State, Shrine, and Honor for the Ethnic Veterans, the Fallen, and Their Bereaved', in M Lewis (ed.), *'History Wars' and Reconciliation in Japan and Korea: The Roles of Historians, Artists and Activists* (Palgrave Macmillan, 2017) 33 and the documentary *Wasurerareta kōgun* [*Forgotten Imperial Army*], dir. N Oshima (1963).

65 Justice Pal concluded his 'dissentient judgment' with this (unattributed) quote from Jefferson Davis, President of the Confederate States of America.

66 F Uitley, *The High Cost of Vengeance* (Henry Regnery Company, 1949) 13.

67 Ibid 302.

applies. In academic scholarship, the IMTFE has been criticised for much of that: the unwillingness to countenance a *tu-quoque* argument with regard to the atomic bombing of Hiroshima and Nagasaki, and the firebombing of Tokyo; the *de facto* immunity of high-ranking individuals, in particular the emperor; the superficial efforts to prosecute Japanese colonial crimes; the neglect of the activities of Unit 731, which conducted medical experiments on humans; the failure to prosecute the use of poisonous gases against Chinese forces, and so on.⁶⁸ *Tokyo Trial* replicates some of the past silences of the IMTFE, but not all of them. This also requires a choice. With regard to sexual violence, *Tokyo Trial* is absolutely silent on it, whereas at the IMTFE rape was prosecuted and condemned among other war crimes, contrary to the Nuremberg IMT.⁶⁹ Even concerning the IMTFE, however, critics have argued that sexual violence was insufficiently addressed, and ‘Asian’ victims were neglected.⁷⁰ Organised sexual slavery, too, was not addressed by the court (although it was referred to in writing by several prosecutorial teams).⁷¹ To quote Helen Durham and Narrell Morris:

While rape charges were included in the Indictment for use at the Tokyo Tribunal, no victims of rape were called to give evidence. Moreover, sexual crimes at the Tribunal tended to be prosecuted euphemistically—as prohibitions against ‘inhumane treatment’, ‘ill-treatment’ or as ‘failure to respect family honour and rights’—and as part of ‘larger’ war crimes, such as the ‘rape’ of Nanjing. Most crucially, the Tribunal failed to address and examine systematically and comprehensively the sexual enslavement of ‘comfort women’ across Asia.⁷²

In *Tokyo Trial*, there is no mention—nor is there, as I have pointed out, a single image—of sexual violence. Nanking is referred to as a place where war crimes and ‘atrocities’ were alleged to have been committed, so that, at best, it could be considered that rapes during the ‘Rape of Nanking’ are implicitly

68 For analysis, see Simpson (2011) 31; Totani (2008) 245-50; N Boister & R Cryer, *The Tokyo International War Crimes Tribunal: A Reappraisal* (Oxford UP, 2008) 63-64; Boister & Cryer (eds) (2008) 604 [49 791], 612 [49 815].

69 Boister & Cryer (eds) (2008) 604 [49 791], 612 [49 815].

70 See, e.g., N Henry, ‘Silence as Collective Memory: Sexual Violence and the Tokyo Trial’, in Tanaka, McCormack & Simpson (eds) (2011) 263. Totani argues that much of the critique is not supported by the trial records: see Totani (2008) 14, 176-86.

71 See, e.g., Henry (2011).

72 H Durham and N Morris, ‘Women’s Bodies and International Criminal Law: From Tokyo to Rabaul’, in Tanaka, McCormack & Simpson (eds) (2011) 283.

included. The other rapes and sexual slavery in the territories Japan attacked and occupied are not even alluded to. Given the long and public controversy on the matter both in Japan and abroad, this silence detonates.⁷³

THE LOCATION OF 'COUNTER'

- 5 'Can war literature stop war?' So asks Kate McLoughlin in *Authoring War*, and leaves the answer open.⁷⁴ Can films on international criminal trials stop crimes such as aggression, war crimes, and crimes against humanity? Do they at least make a convincing case for the necessity of criminal justice after such crimes? Why should they? These questions condense the counter-poles of expectation and critique that dominate discussions on film, or more broadly images, and
10 international criminal justice today. From 'outreach', marketing, and fundraising, to 'realism' and 'criticism/critique', films vary in their proximity to or distance from the ideological motifs that underlie the 'international criminal justice project' today.⁷⁵ The casual truth claims and political choices made in
15 *Tokyo Trial* invite an interrogation of the series's underpinnings. At the end of the last episode, written statements fill the screen, the final ones reporting that the ICC is 'strongly criticised by some for not playing the role it is meant to play. Tumultuous wars and conflicts are still taking place throughout the world' (episode 4). Despite its adherence to the codes of the genre of historical drama,
20 *Tokyo Trial* reaches towards today's international criminal justice—not in order to join the ranks of the countless audio-visual products that habitually promote international criminal justice today, but rather to emphasise its shadows. The majority judges appear besmirched by national politics and at times are condescending towards the broader, post-colonial international community advocated by Pal, Röling, and Jaranilla. Victims of Japanese politicians and generals
25 and their suffering are not in the foreground, whereas the hardships of Japanese society are brought to view. These choices stir the hidden assumptions, breaking

73 For an insightful comparison between Chinese and Japanese films, see A Weiss, 'Contested Images of Rape: The Nanjing Massacre in Chinese and Japanese Films' 41 *Signs: Journal of Women in Culture and Society* (2016) 432.

74 K McLoughlin, *Authoring War: The Literary Representations of War from the Iliad to Iraq* (Cambridge UP, 2011) 190.

75 See, e.g., C Schwöbel, 'The Market and Marketing of International Criminal Law', in C Schwöbel (ed.), *Critical Approaches to International Criminal Law: An Introduction* (Routledge, 2014) 264; C Schwöbel, 'Spectacle in International Criminal Law: The Fundraising Image of Victimhood' 4 *London Review of International Law* (2016) 247; I Tallgren, 'Come and See? The Power of Images and International Criminal Justice' 17 *International Criminal Law Review* (2016) 259.

the stereotypes of savages, victims, and saviours⁷⁶ familiar in the genre of films on international criminal justice, whilst at the same time creating or reinforcing other stereotypes, such as nationalistic ones. The spectator is invited to reflect on the objectives of the IMTFE as a whole, and the motivations of its main protagonists, in particular.

By unsettling the spectator into questions and doubts, the series counters the predominant narrative—at least of the 1990s and 2000s—that international criminal justice’s main problem has been that there is not enough of it. By exposing struggles of power and inequality among the judges, *Tokyo Trial* ruptures patterns of familiar aesthetics. Pal and Röling become anti-heroes of international criminal justice, credited for their courage to question the familiar tale of humanity’s progress through international law and its institutions, shaped by the nations exercising political, economic and military dominance. Yet, *Tokyo Trial* cannot be so simply pigeonholed. With regard to legal and historical scholarship on the IMTFE in the English-speaking world, *Tokyo Trial* is not a new ‘counter-narrative’. Certainly after the publication of Richard Minear’s *Victors’ Justice* in 1971, the IMTFE had been the poor cousin of Nuremberg, either passed over in silence or criticised.⁷⁷ Only since 2008 has a more nuanced reading of the IMTFE been audible.⁷⁸ In Japan, and in Japanese, attitudes have fluctuated.⁷⁹ The scholarly condemnation of the IMTFE has not necessarily corresponded in content with Japanese nationalist revisionism. I suspect that part of the ‘Tokyo bashing’ may have served simply to better glorify Nuremberg. But critical academic views have at times also furnished nationalist and imperialist protagonists with arguments and credibility.

Tokyo Trial may, then, for some viewers work as a reconsolidation of the myths of the Japanese nation and people rather than a critical history or a ‘counter-history’ of early international criminal justice.⁸⁰ For others, *Tokyo Trial* provides welcome imagery for a ‘TWAIL reading’ of the IMTFE. For

76 M Mutua, ‘Savages, Victims, and Saviours: The Metaphor of Human Rights’ 42 *Harvard International Law Journal* (2001) 201; RH Minear, *Victors’ Justice: The Tokyo War Crimes Trial* (Princeton UP, 1973).

77 Minear (1973).

78 Totani (2008) and Boister & Cryer (2008), followed by Tanaka, McCormack & Simpson (eds) (2011).

79 See Totani (2008) 190–262; Futamura (2008) 68–115; and, most recently, M Futamura, ‘Japanese Societal Attitudes towards the Tokyo Trial: A Contemporary Perspective’ 9 *Asia-Pacific Journal: Japan Focus* (2011). See also Lewis (2017).

80 M Foucault, ‘Nietzsche, Genealogy, History’, in *Logic, Counter-Memory, Practice: Selected Essays and Interviews* ed. DF Bouchard (Cornell UP, 1988) 139. See also M Landy, *Cinema & Counter-History* (Indiana UP, 2015).

yet others, the series sings the praises of the international judges for their independence and courage, moral sheriffs by virtue of law. The sensitivities and affinities given flesh through the series may appear nationally, regionally and ideologically situated, speaking for a distant continuation of the antagonisms of war. This is also true for cinema and TV productions that touch upon hotspots of what Anderson labels ‘cultural memory’.⁸¹ For the dialogical processes by which interpretations and significations are rendered, time matters. Historical drama surfs the waves of the era of its production. In the post-WWII 1940s or the post-Cold War 1990s, the international or supranational forces were on the side of the heroes, safeguarding ‘humanity’ against nasty nationalist politics. In today’s sinister ‘post-mortem modernity’, the national, local and personal may at times stand for credibility and authenticity, against the immoral or faceless politics of the international or the obscure financial poles of multinational power. In that sense, *Tokyo Trial* is as much a reflection of the concerns of the era of its making as it is a history of the IMTFE, of anti-colonial Justice Pal, or of avant-gardist Justice Röling. Yet as Homi Bhabha famously argues, ‘post-colonial postmodernity’ lives within incommensurable temporalities, or in a constant time-lag, resistant to attempts at holistic forms of social explanation.⁸² Perhaps the ambivalence of *Tokyo Trial* can be credited as a success. For teachers of international criminal law, where better to find material for a thought-provoking course?

CONCLUSION

The issue is man’s future. The shape of that future depends on whether we can still organize the world more rationally by levelling all national antagonisms, and federate its races, nations and cultures on the sincere basis of equality of East and West, so that the values of each civilization complement and reinforce rather than combat and destroy one another.⁸³

‘Just lately, I have become obsessed with eating a piece of good Scottish beef and a decent Yorkshire pudding. I don’t seem to have an appetite for anything else at all’, complains Justice Patrick from the UK, sitting at table with Justice Mei from China who is calmly enjoying an Asian dish with chopsticks from a bowl (episode 4). Beyond its cavalcade of caricatures, *Tokyo Trial* is also a story of the IMTFE judges as individuals in a difficult profession. Their

81 Anderson (2011).

82 H Bhabha, *The Location of Culture* (Routledge, 1994).

83 Pal (1955) 426.

extenuating task in Tokyo drifts along for much longer than planned and grows more complicated than foreseen, during a period when transport and means of communication were much slower than today. The Western judges find themselves in the empire of the Other in the East, even if it is in ruins and under Western occupation. The first US judge returns home abruptly, discouraged and offended. The native English speakers, in particular, cling together with their small talk and drinks, fortifying themselves to face exotic and opposing views: the scary anti-colonialist Pal, the uncontrollable Röling.

There are external comforts: a first-class hotel, restaurant meals, service cars, some excursions and concerts. But the judges are far from home. They have left behind wives—for Mei in the midst of civil war in China—and children, beaches, and gardens. They interact and compete in a tense working environment with constant stress and creeping boredom. As the Soviet judge puts it: ‘I feel this trial in my backside’ (episode 4). The spectator senses the barriers. The judges are not shown socialising with the Japanese. The only exception is Röling’s friendship with the author Takeyama, used by the script-writers to inject Japanese views of the ongoing trial into the picture. These take the ‘orientalised’ form of a traditionally dressed Takeyama dispensing wisdom in a classical tearoom, strolling on the beach, or admiring a Hiroshige print.

The foreignness to, and distance from, the local that characterised the judges in Tokyo marked the flipside of the independence, integrity, and impartiality cherished as the hallmarks of international criminal justice. In today’s discussions, international criminal trials have their place only when the ordinary national institutions are non-existent or tarnished by bias. In the case of the IMTFE, the judges did not only represent the ‘victorious’ nations of the WWII, but also the peoples drawn into the war and victimised by it, some more violently than others. In that sense, they may well have been foreigners, as judges in Japan, but it would be hard to claim that they had much distance. Despite the eventual integrity of the individuals concerned, they may have been too close to the war, and to their own national polities, to respect their vow to ‘duly administer justice, according to law, without fear, favour or affection, and according to our consciences’.⁸⁴

This is one aspect in which *Tokyo Trial* undoubtedly succeeds: it renders the sense of complexity, of unavoidable entanglement of interests and loyalties inherent in the situation of the first generation of ‘international’ criminal judges. Midwives of the ‘discipline of international criminal law’, they were conscripted to become stars in a spectacle the screenplay for which had been

84 The affirmation stated by the IMTFE judges: see Boister & Cryer (eds) (2008) 701 [46] (Dissenting Opinion of Justice Röling).

dictated from above. The judges were not blind to their condition. Between messages from capitals, court sessions, and letters to wives, we see them in *Tokyo Trial* not at 'the birth of justice' but busy with community building: exchanging with their fellows, sharing past experiences and intimate utopias of an international law to come, and critically analysing the limits of their own role in it. Torn apart and traumatised by the war, about to be blown open by the post-war wave of decolonisation, the professional community of international lawyers was establishing a new field of expertise which the losing side of the war would soon join. Even if they were divided rather than united, dependent on their political masters rather than free agents, the judges were aspiring to a professional and intellectual space of their own. At times, the charm of 'cinematographic art' operates and the judges reach us as they struggle to break out of their cage in Tokyo 70 years ago, smoking and typing their way into our lecture rooms and libraries.